No. 558.

Brief of Avery, MacRae & Day for D.

No. 558.

Filed Jan. 26, 1898.

(In the Supreme Court, U. S.
FILED
JAN 26 1898
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

JAMES W. WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA ON THE RELATION OF L. C. CALDWELL, DEFENDANT IN ERROR.

Brief of A. C. Avery, J. C. MacRae, Wm. H. Day, Counsel for Defendant in Error, on the Motion to Dismiss and Affirm.

Defendant in error respectfully submits that his motion should be granted—

1. Because no Federal question is really involved in the determination of the controversy between the parties to the action.

The plaintiff in error invokes the jurisdiction of this Honorable Court, upon the grounds—

(1). That his suspension from the office of Railroad Commissioner by the Governor of North Carolina, and in pursuance of the act creating his office, was without due process of law.

(2). That by such action of the Governor he was deprived of the equal protection of the laws.

(3 and 4). That the refusal of the Superior Court, in the action of quo warranto, to submit issues to a jury, and its ruling that the statute and the action of the Governor did not deprive him of his liberties and property without due process of law, and did not deprive him of the equal protection of the laws, were in violation of the 14th amendment to the Constitution of the United States.

The Governor of North Carolina suspended the plaintiff in error on the 23d of September, 1897, under the authority of Section 1, Chapter 320, Laws of 1891, which provided that if a Railroad Commissioner should have any interest in any way in a railroad company, or in case he should become disqualified to act, it should be the duty of the Governor to suspend him from office, and report the fact of his suspension, together with the reasons therefor, to the next General Assembly; and the question of his removal from office was to be determined by a majority of the General Assembly in joint session; and the Governor was empowered to fill the vacancy caused by such suspension. So careful, however, was the law of the rights of the suspended Commissioner, that if the next General Assembly did not remove him, he was to be re-instated in office, and draw his salary for the period of his suspension.

The Governor duly appointed the relator, who immediately qualified and made demand for the office. The Supreme Court of the State have construed the said statute and have held, that its provisions are not in conflict with the Constitution of the State, that it confined the authority to suspend to the Governor, and that the relator is rightfully holding and discharging the duties of the said office. (See the act cited in the opinion of the Court, on page 27 of the record.)

"Whether statutes of a Legislature or a State have

been duly enacted in accordance with the requirements of the Constitution of such State, is not a Federal question, and the decision of State Courts as to what are the laws of the State is binding upon the Courts of the United States." Leeper v. Texas, 139 U. S., 463, 467, and authorities cited, especially South Ottawa v. Perkins, 94 U. S., 260, 268.

2. If the interpretation of the statute did not deprive the plaintiff in error of equal and impartial justice, as administered to other persons belonging to the same class as himself, the administration of that law, as it has been enforced, was due process.

Leeper v. Texas, supra.

"If the Supreme Court of the State has acted in consonance with the constitutional laws of the State, and its own procedure, it could only be in very exceptional circumstances, that this Court would feel justified in saying that there had been a failure of due process of law."

Allen v. Georgia, 166 U. S., 138, 140.
Harvey v. Elliott 167 U. S., 409, 443.
Giazza v. Tiernan, 148 U. S., 657, 661.
Duncan v. Missouri, 152 U. S., 377.

The Governor in his order of suspension and appointment to fill the vacancy, calls attention to the fact that if the suspended Commissioner shall refuse to surrender the office, due process of law shall be invoked in the enforcement of his order. (See page — of the record.)

Our presence here, plaintiff in error still seeking to act in defiance of his suspension, the action brought in the State Courts by defendant in error, shows due process of law.

3. "Wherever the law operates alike on all persons

and property similarly situated, equal protection cannot be said to be denied."

Walston v. Nevin, 128 U. S., 578, 582.

4. It was the province of the State Courts to determine whether the plaintiff in error was entitled to a trial by jury of his right to the office, and if the Supreme Court of the State, following its own rulings as to others similarly situated, has held that he has no right to demand that mode of trial he has not been the denied the equal protection of the law, or due process thereunder.

Kennard v. Louisiana, 92 U. S., 480.

Hartads v. California, 110 U. S., at page 532 et seq.

5. The Supreme Court of North Carolina held an act constitutional which conferred upon a single Justice of that Court supervisory jurisdiction over the Clerks of Superior Courts in the appointment of judges of election, and held also, that the supervisory power carried with it by implication the authority to remove a judge of election, already inducted into office.

Harkins v. Cathey, 119 N. C., 649.

McDonald v. Morrow, 119 N. C., 666, 676.

In McDonald v. Morrow, supra, at page 677, the Court said:

"This provision of the statute (that in reference to the supervisory power construed to include authority to remove) entered into and became a part of the contract or terms under which they accepted these offices to the same extent as if it had been an express stipulation between the parties."

McCless v. Meekins, 117 N. C., 34, and authorities there cited.

This distinguishes it from Hoke v. Henderson (4 Dev., 1).

The last-named case was that chiefly relied upon by counsel for plaintiff in error in the discussion before the Supreme Court of North Carolina. (See also authorities cited in the opinion of Justice Douglas, on page 39 of the printed record, especially Ward v. Elizabeth City, 27 S. E. Rep., 993 (121 N. C.)

In Ward v. Elizabeth City, supra, the Court said in substance, that while that Court had differed with almost all of the States in holding that an office, which is created by a Legislature (and does not owe its existence to the State Constitution) involves a contract, and that where the Legislature in the act creating it inserted a provision affecting the tenure, such limitation upon the tenure became a part of the contract. So that where the Legislature has, as in this act conferred on the Governor the power of suspension, one who takes the office in contemplation of such a provision, enters into an agreement to abide by it.

Whether the power of suspension or removal grows out of the doctrine, that there is an implied right in the principal to revoke an agency, or is derived from the express terms of a statute, which the incumbent by acceptance has made an express stipulation of the contract under which he holds, there is no just ground for complaint. The legal effect of a removal or suspension under the terms of an express agreement, must be practically the same, as where the authority is implied from the relation between the party exercising, and the person subject to the exercise of the authority.

6. The Constitution of North Carolina has been construed as vesting in the Legislature all of the residuary powers, or all powers not delegated to the Federal Gov-

ernment or by the State Constitution to one or the other co-ordinate departments.

McDonald v. Morrow, 119 N. C., 670.
Ewart v. Jones, 116 N. C., 570.

The Court in this case (see opinion of Justice Douglas, bottom of page 39 of the record) rested its ruling upon the ground that the plaintiff in error accepted his office subject to whatever law the Legislature might in the exercise of its constitutional powers, see fit to pass, citing:

Ewart v. Jones, 116 N. C., 570.
McDonald v. Morrow, 119 N. C., 666, 670.
Head v. University of Mo., 19 Wallace, 526.

7. The authorities already cited establish the principle that the Supreme Court of the United States will consider binding the construction placed by the highest Courts of a State upon its own Constitution and laws made in pursuance of it.

In the opinion of Justice Douglas (page 41 of the printed record) the Railroad Commission was held to be a mere administrative board, not coming up to the dignity of a Court of Record of general jurisdiction. Citing

Express Company v. Railroad, 111 N. C., 463, 474.
Reagan v. Farmer's L. and T. Co., 154 U. S., 394.

8. But, if it be conceded that the statute passed subsequently to that creating the Commission and during the same session (Laws of North Carolina, 1891, Chapter 498, page 565), constituted it a Court of Record inferior to the Supreme Court and of limited jurisdiction, the fact would still remain that it is a legislative office, created under the authority of Sections 2 and 30 of Article 4 of the Constitution of North Carolina, which em-

powers the General Assembly to establish by law, "Courts inferior to the Supreme Court, prescibe the manner of electing the Judges and fix their terms of office, not to exceed eight years; and the rule laid down by the Supreme Court of North Carolina, is, that the Legislature has the power under the Constitution to remove or provide for the removal of all such officers, as it has the power to create, in the absense of any express prohibition (which it is not contended exists) in the State Constitution."

In Ward v. Elizabeth City, 27 S. E. Rep., 993 (121 N. C.), the Court said:

"Every one who accepts an office created by legislative enactment, takes it with notice that the Legislature has power to abolish his office and is fixed with acceptance of all the provisions of the act creating the office." So it is contended for the relator here, that the plaintiff in error accepted the office with the provision, that the Governor might exercise the right to suspend him when he should deem it just to do so, subject to the power of restoration by the next Legislature, reserved in the statute. The Constitution of the State will be searched in vain for any provision prohibiting the Legislature from conferring such a power on the Governor.

He is not deprived of the equal protection of the laws by reason of the fact that a process of removal or suspension is made to apply to Railroad Commissioners which does not apply to Judges of other Courts. If he is a Judge, there is no provision of the Constitution of North Carolina that Judges shall be tried by impeachment.

"We are to look, not at the Constitution, but to the statute law to ascertain what persons are liable to impeachment."

People v. Heaton, 77 N. C., 18.

If the statute can provide for the trial of a public officer by impeachment, it can provide other modes of trial, and this it does.

Special legislation is not obnoxious to the Fourteenth Amendment, if all persons subject to it are treated alike.

"But the privileges and immunities of citizens of the United States, protected by the Fourteenth Amendment, are privileges and immunities arising out of the nature and essential character of the Federal Government and granted or secured by the Constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

Duncan v. Missouri, 152 U. S., 377.

This law bears equally on all Railroad Commissioners.

Cooley C. L., 14.
Black Con., 405.

If this act deprives him of the equal protection of the laws, the Interstate Commerce Act is void for the same reason.

Sec. 11 of said Act, February 4, 1887.

9. The refusal to grant the plaintiff in error a trial by jury of the issues tendered was not a denial of due process, or a failure to extend to him the equal protection of the law.

"Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State."

Walker v. Sauvinet, 92 U. S., 90.

The plaintiff in error has no property nor vested right

in the ancient right of trial by jury, if the State imposes limitations upon such right.

Mumm v. Illinois, 94 U. S., 113, 114.
Missouri v. Lewis, 101 U. S., 22, 31.

Under the law of North Carolina it has been held, that a person may waive his constitutional right to insist upon a trial by jury, of issues involving his title to the most valuable property, by neglecting to assert and insist upon such right in apt time, or by conduct inconsistent with the apparent purpose of insisting on such right, whereby his adversary is misled or not put on notice so that he may prepare for trial. Driller Company v. Worth, 117 N. C., 515; and in the same case, 118 N. C., 746, it was held that a party might be deprived of the right of trial by jury by his own consent, and that such consent would be implied and the right waived by a failure to object to an order of compulsory reference when made, or by a subsequent failure to assert the claim definitely and specifically in exceptions filed so as to give notice to his adversary of the precise issues upon which preparation for trial is to be made.

It was also declared in the opinions in those cases, that the right to trial by jury may be waived by implication, by failure of a party to appear, or expressly by written agreement, or by oral consent, entered of record.

The rulings of the Court in this case, that, by acceptance of the office under the provisions of the statute that the Governor should exercise at his discretion the power of suspension, the plaintiff in error expressly waived his right of trial by jury, are in consonance with the principle laid down in other cases, involving the right to property, and follow the principles stated in McDonald v. Morrow, 119 N. C., 677, which hold that

in such cases the statute constitutes a part of the terms of the contract between the State and the office-holder under it.

And in the case before us all the facts alleged in the complaint were admitted in the answer. There were no issues to be tried; the question before the Court was whether, under these facts and the law, the Governor had power to suspend and appoint, and did he act within the powers confided to him by law.

10. The power to suspend the Commissioners was conferred upon the Governor in order to meet an emergency, when it should appear to him during the recess between sessions of the Legislature, that one or more of these officers had become interested in a railway company operating in the State, so as to preclude the possibility of his being a fair judge.

It is inherent in the office of a Judge, that he should be subject to suspension, removal or disqualification to act when he becomes interested in the matters to be adjudicated, and the Legislature alone is clothed with the power to provide the procedure for removal in such cases.

1 Blackstone, 91.
Broom's Legal Maxims, 118.
White v. Connelly, 105 N. C., pp. 69, 70, 71.

We respectfully contend that the plaintiff in error has mistaken the idea of the protection guaranteed to the citizen of the United States by the Fourteenth Amendment. Discussing the effect of this amendment, Black's Constitutional Law, page 463, says:

"In this connection, it is important to observe that the privileges and immunities here protected are those of the citizens of the United States (not of the citizens of a State), and that they are such only as belong to those citizens in virtue of their citizenship. Another

part of the Constitution guarantees to the citizens of each State the privileges and immunities of citizens in the several States. But the Fourteenth Amendment is not supplementary to that clause, and has no relation to it. It deals with a different matter, viz., the rights of citizens of the United States as such. It would be perhaps, too narrow a construction to say that these rights must all be political in their character, or related to the status of citizenship. But it is clear that they must have some relation to the legitimate operations of the general government, to the purposes for which it was created, or to the powers which are committed to it."

We invite attention also to the distinction between citizenship of the United States and that of a State, in the light of the Fourteenth Amendment, as set out by this Court in the Slaughter House cases, 116 U. S., at page 74, et seq.

It is sufficient to ask, how can this constitutional provision affect a citizen of North Carolina, an office-holder, by virtue of the laws of his own State, in regard to restrictions placed by the laws of North Carolina upon the exercise of the office created by the laws?

11. The appeal is manifestly frivolous if our contention is correct that no Federal question is involved, and we submit that the same should be dismissed.

Its only affect can be delay, in order that the plaintiff in error may retain possession of his office until action is taken by the next Legislature of North Carolina, and so defeat the object of the act creating the office, which is to prevent interested men from deciding questions of vital importance arising between the people and the quasi public corporations.

A. C. AVERY,
J. C. MACRAE,
W. H. DAY,
Counsel for Defendant in Error.

No. 559.

Office Supreme Court, U. S.
FILED
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

S. OTHO WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA, BY ZEB. V. WALSER, ATTORNEY GENERAL, ON THE RELATION OF JOHN H. PEARSON.

Brief of A. C. Avery, J. C. RacRae, Wm. H. Day, Counsel for Defendant in Error, on the Motion to Dismiss and Affirm.

Defendant in error respectfully submits that his motion should be granted—

1. Because no Federal question is really involved in the determination of the controversy between the parties to the action.

The plaintiff in error invokes the jurisdiction of this Honorable Court, upon the grounds—

(1). That his suspension from the office of Railroad Commissioner by the Governor of North Carolina, and in pursuance of the act creating his office, was without due process of law.

(2). That by such action of the Governor he was deprived of the equal protection of the laws.

(3 and 4). That the refusal of the Superior Court, in the action of quo warranto, to submit issues to a jury, and its ruling that the statute and the action of the Governor did not deprive him of his liberties and property without due process of law, and did not deprive him of the equal protection of the laws, were in violation of the 14th amendment to the Constitution of the United States.

The Governor of North Carolina suspended the plaintiff in error on the 23d of September, 1897, under the authority of Section 1, Chapter 320, Laws of 1891, which provided that if a Railroad Commissioner should have any interest in any way in a railroad company, or in case he should become disqualified to act, it should be the duty of the Governor to suspend him from office, and report the fact of his suspension, together with the reasons therefor, to the next General Assembly; and the question of his removal from office was to be determined by a majority of the General Assembly in joint session; and the Governor was empowered to fill the vacancy caused by such suspension. So careful, however, was the law of the rights of the suspended Commissioner, that if the next General Assembly did not remove him, he was to be re-instated in office, and draw his salary for the period of his suspension.

The Governor duly appointed the relator, who immediately qualified and made demand for the office. The Supreme Court of the State have construed the said statute and have held, that its provisions are not in conflict with the Constitution of the State, that it confined the authority to suspend to the Governor, and that the relator is rightfully holding and discharging the duties of the said office. (See the act cited in the opinion of the Court, on page 27 of the record.)

"Whether statutes of a Legislature or a State have

been duly enacted in accordance with the requirements of the Constitution of such State, is not a Federal question, and the decision of State Courts as to what are the laws of the State is binding upon the Courts of the United States." Leeper v. Texas, 139 U. S., 463, 467, and authorities cited, especially South Ottawa v. Perkins, 94 U. S., 260, 268.

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Our presence here, plaintiff in error still seeking to act in defiance of his suspension, the action brought in the State Courts by defendant in error, shows due process of law.

3. "Wherever the law operates alike on all persons

and property similarly situated, equal protection cannot be said to be denied."

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4. It was the province of the State Courts to determine whether the plaintiff in error was entitled to a trial by jury of his right to the office, and if the Supreme Court of the State, following its own rulings as to others similarly situated, has held that he has no right to demand that mode of trial he has not been the denied the equal protection of the law, or due process thereunder.

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He is not deprived of the equal protection of the laws by reason of the fact that a process of removal or suspension is made to apply to Railroad Commissioners which does not apply to Judges of other Courts. If he is a Judge, there is no provision of the Constitution of North Carolina that Judges shall be tried by impeachment.

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It was also declared in the opinions in those cases, that the right to trial by jury may be waived by implication, by failure of a party to appear, or expressly by written agreement, or by oral consent, entered of record.

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in such cases the statute constitutes a part of the terms of the contract between the State and the office-holder under it.

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10. The power to suspend the Commissioners was conferred upon the Governor in order to meet an emergency, when it should appear to him during the recess between sessions of the Legislature, that one or more of these officers had become interested in a railway company operating in the State, so as to preclude the possibility of his being a fair judge.

It is inherent in the office of a Judge, that he should be subject to suspension, removal or disqualification to act when he becomes interested in the matters to be adjudicated, and the Legislature alone is clothed with the power to provide the procedure for removal in such cases.

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We respectfully contend that the plaintiff in error has mistaken the idea of the protection guaranteed to the citizen of the United States by the Fourteenth Amendment. Discussing the effect of this amendment, Black's Constitutional Law, page 463, says:

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part of the Constitution guarantees to the citizens of each State the privileges and immunities of citizens in the several States. But the Fourteenth Amendment is not supplementary to that clause, and has no relation to it. It deals with a different matter, viz., the rights of citizens of the United States as such. It would be perhaps, too narrow a construction to say that these rights must all be political in their character, or related to the status of citizenship. But it is clear that they must have some relation to the legitimate operations of the general government, to the purposes for which it was created, or to the powers which are committed to it."

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It is sufficient to ask, how can this constitutional provision affect a citizen of North Carolina, an office-holder, by virtue of the laws of his own State, in regard to restrictions placed by the laws of North Carolina upon the exercise of the office created by the laws?

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A. C. AVERY,
J. C. MACRAE,
W. H. DAY,
Counsel for Defendant in Error.

PLAINTIFF'S BRIEF

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Brf. of Burton for P. E. Com mo

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S. OTHO WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA, BY Z. V. WALSER, ATTORNEY GENERAL, ON THE RELATION OF JOHN H. PEARSON, DEFENDANT IN ERROR.

Brief of Plaintiff in Error on Motion to Dismiss or Affirm.

R. O. BURTON,
Counsel for Plaintiff in Error.

Nos. 558 and 559.

IN THE SUPREME COURT OF THE UNITED STATES,

FEBRUARY TERM, 1898.

JAS. W. WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA ON THE RELATION OF L. C. CALDWELL, DEFENDANT IN ERROR,

AND

S. OTHO WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA, BY Z. V. WALSER, ATTORNEY GENERAL, ON THE RELATION OF JOHN H. PEARSON, DEFENDANT IN ERROR.

Brief of Plaintiff in Error on Motion to Dismiss or Affirm.

STATEMENT OF FACTS.

This is an action in the nature of *quo warranto*, to oust the the plaintiff in error from his office of Railroad Commissioner.

Jas. W. Wilson was elected Railroad Commissioner for the term beginning April 1, 1892, and ending April 1, 1899. On

the 24th of August, 1897, Daniel L. Russell, Governor, sent to him the following letter:

To JAMES W. WILSON, ESQ., *Member of the Railroad Commission of North Carolina:*

SIR:—By section first of the Railroad Commission Act, ratified the 5th day of March, 1891, it is made the duty of the Governor to suspend from office any Railroad Commissioner who shall be the holder of "any stock or bond of any railroad company, or be the agent or employee of any such company, or have any interest in any way in such company, or in case any one of them shall be disqualified to act." It is alleged that you are the joint owner with Col. A. B. Andrews, the first vice-president of the Southern Railroad, general political manager of the same for North Carolina, of a certain piece of hotel property known as Round Knob, situated on the line of the said railroad; the said hotel property is worth little or nothing except as a hotel, and that it is worthless for this purpose except when designated and patronized by the Southern Railroad as an eating-house for their passenger trains; that said hotel property has been unoccupied and unused for any purpose for several years past and has brought in no revenue to you as one of its owners; that it is impossible for you to use, rent or lease said property unless some understanding, agreement or contract could be made with the Southern Railroad Company to designate and patronize the said hotel as a railroad eating-house; that you and the other owner or owners of said hotel property have secured some agreement, understanding or contract from the Southern Railroad Company to abandon other eating-houses and designate Round Knob as an eating-house; and that by virtue of said arrangements with said railroad that you have been able to lease said hotel property to S. Otho Wilson, or to his mother through the said Wilson, for profit.

It is further alleged that you have a son in the employment of the Southern Railroad Company at Morganton; that

he was appointed to this place by the Southern Railroad Company at your request, and that he was appointed over others entitled to the place by promotion under the practice of the company, and that this was done for your accommodation and at your request.

These allegations have been made to me by many persons, and I think publication of them has been made in the public press If they or the material substance of them be true —as to which I am expressing no opinion—then the questions to be determined are as follows:

First. Have you acquired any interest in any way in such company in violation of law?

Second. Have you become disqualified to act as a fair judge or commissioner?

Under the law the Governor has not only a right but is required to suspend a railroad commissioner who commits a breach of the statute, which has been cited, and this he may do, as in other cases of executive removals, without notice to the party interested; but I shall not pass judgment or decide this matter until you have had a full opportunity to be heard by way of denial or explanation or justification or other defense. You will therefore please show cause in writing on or before Wednesday, the 1st day of September, 1897, at the Executive office in Raleigh, why you should not be suspended from your said office and a report thereof be made to the next General Assembly according to law. On the return day of this notice, you will please make answer and proofs in writing, and be there in person or by counsel at your election.

DANIEL L. RUSSELL,
Governor.

To which said James W. Wilson made reply as follows:

"AUGUST 30TH, 1897.

TO DANIEL L. RUSSELL,
Governor of North Carolina:

SIR: Your favor of the 25th, citing me to appear before you on Wednesday, the 1st day of September, and reply in writing to certain rumors or charges from parties unknown to me, and show cause why I should not be removed from the responsible position of chairman of the railroad commission, agreeable to section 1 of the act creating this commission, was duly received.

In obedience thereto I herewith submit this, my answer to each charge in the order as given in your letter. It is drawn by myself and possibly free from the elegant diction which a lawyer would have imparted, but I feel sure it will carry conviction to an impartial mind.

1st. It is not true, as alleged, that I am the joint owner with Col. A. B. Andrews, vice-president of the Southern Railway and general political manager of the same for North Carolina, in a certain piece of hotel property known as Round Knob.

2nd. It is not true that said hotel property is worthless for that purpose except when designated and patronized by the Southern Railway Company as an eating-house for their passenger trains.

3rd. It is not true that said hotel property has been unoccupied and unused for any purpose for several years past and brought in no revenue to me as one of its owners.

4th. It is not true that it was impossible to use, lease or rent said property unless some understanding, agreement or contract could be made with the Southern Railway to designate and patronize the said hotel as a railroad eating-house.

5th. It is not true, as alleged that I with the other owner or owners of said property have secured an agreement, understanding or contract from the Southern Railway Company to abandon other eating-houses and designate Round Knob as an eating-house, and by virtue of said agreements

with said railroad that I have been able to lease said hotel property to Otho Wilson, or his mother, through the said Wilson, for profit.

6th. It is untrue, as further alleged, that I have a son in the employment of the Southern Railway Company at my request and that he was appointed over others entitled to the place by promotion under the practice of the company, and this was done for my accommodation and at my request. I hereby denounce these allegations as made to you by many persons as false, and demand the proof.

In explanation I will say that about 1881 Col. Andrews and myself built this hotel at a cost of about $8,000. It is not worthless, as stated, but is a most convenient and beautiful hotel, with thirty rooms, closets and baths on each floor, and was leased and run as a hotel for several years with no meals supplied to passengers. The property has not been unoccupied for years, as charged, but on the contrary was leased up to last year, at an annual rental of $500 per annum, to a responsible party, with no understanding of any kind with the Southern Railway Company.

In a casual conversation with Mr. Otho Wilson, my recollection is that I spoke of this very desirable property, which was then vacant, the lease of Friscard & Co. having expired, and saying that the superintendent of the road had sent me word that if some one would open and keep a good house he would make it a dinner house; the hotel at Hickory was then closed, and my impression is that Asheville was not then a regular eating-house, but of this I am not sure. Mr. Wilson remarked that his mother was looking around for a boarding-house, and that possibly this might suit her, and he would go up and examine the property. This he did, and on his return expressed himself as greatly pleased, but said the former lessee had left the property in bad condition and very dirty. I was aware of this, and replied that, on this account, if his mother would put the place in good repair she could have it the first year free of rent—this much

for the profit as charged; the message to me about the eating-house was not intended for Mr. Otho Wilson or his mother, but was sent before Mr. Wilson or his mother ever thought of it, or intended for any person I could get who would keep a first-class table. The management of the property was left entirely to me, and my recollection is that I never mentioned the matter to Col. Andrews until the trade was consummated through Mr. Otho Wilson for his mother.

The land upon which the Round Knob property was located belonged to John Malone, Col. Crockford and myself. This party owed a debt of about $3,000 to R. H. Brown, of McDowell County. I am the only one of the parties now living, and was alone responsible for the debt. For the hotel itself I paid $6,000, Col. Andrews $3,000, Col. Andrews' interest being about one-quarter of the hotel, with about ten acres of land adjoining. Before the receipt of your letter I had no idea that any man in North Carolina seriously considered that my owning a piece of property jointly with Col. Andrews, and held jointly by us since 1881, and now rented by a widow, which being in addition to a summer resort was a dinner station for the passenger trains of the Southern Railway, would ever in any way be so construed as to make me in any form under obligations to the Southern Railway.

Finding, however, by your letter that there were parties who believed or pretended to believe that this was indirectly a violation of the act, I promptly, under the advice of friends, to avoid "even the appearance of evil," deeded my individual interests in the property to R. H. Brown for his claim of about $3,000 about the value at the present depreciation of the property. This was done agreeably to Section 1 of the Act to avoid any criticism by even the captious as to my conduct as Railroad Commissioner, feeling no uneasiness that your fairness as a judge should be so biased as to decide that with the showing made you could with any pretension of justice, remove me from the office now held by the

unanimous support of the Legislature of North Carolina; for this unprecedented compliment I have never before had an opportunity to return thanks.

As to the charges about my son, I will say that he is no minor, as charged, but is twenty-seven years old, and is one of the oldest employees on the division upon which he is stationed. About seven years ago the agent at Morganton resigned. My son was his chief clerk, and in the very line of promotion. V. E. McBee, general superintendent of the Seaboard Air Line, was at that time superintendent of that division; he had previously promised my son, as was told, that he would promote him at the first opportunity. Mr. McBee kept his promise. I have no recollection of it, but it is more than probable that I spoke to Capt. McBee in his behalf. It would have been a most unnatural father who would have done otherwise. I believe this covers the entire bill of charges.

* * * * * * * *

In addition to the facts, I will say that the State of North Carolina has a constitution which you and I have sworn to support. This constitution and the laws as expounded guarantee protection to its humblest citizen. To a lawyer of your acknowledged ability, it may appear presumptious for me to call to your attention sections 4 and 5, article 6, of the State constitution, which reads as follows:

"The following classes of persons shall be disqualified for offices: First, all persons who shall deny the being of Almighty God; second, all persons who shall have been convicted of treason, perjury or of any infamous crime, etc." See also article 4, section 31. Also article 1, section 19, of Bill of Rights. This I will copy in full, as it is regarded by every freeman as a bulwark of liberty. It reads as follows: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."

See also the 14th amendment of the constitution of the United States, which forbids any State to deprive a citizen of life, liberty or property without due process of law. See also decisions of our Supreme Court: *Hoke* v. *Henderson*, 4 Devereux; *Cotton* v. *Ellis*, 7 Jones; *Bunting* v. *Gates*, 77 N. C.; *Branson* v. *Turner*, 70 N. C.; *Howerton* v. *Tate*, 70 N. C. Legislature cannot confer on an executive judicial powers. See Cooley on Constitutional Limitations. Act 1891, making railroad commission a court of record."

On September 23, 1897, the Governor addressed to him the following communication:

To JAMES W. WILSON, ESQ,
Chairman Railroad Commission.

SIR: Take notice that after due investigation and consideration I am convinced that you have violated the Railroad Commission law in some of the particulars mentioned in my letter to you August 24th, 1897, and that you have not only violated said Act in the specification set out in said Act, but that you have otherwise, within the meaning and intent and words of said Act become disqualified to act.

Now, therefore, in obedience to the duty imposed upon me by said Act of the Assembly, I do hereby suspend you from the office of Railroad Commissioner and Chairman of said Commission, such suspension to continue until the question of your removal or restoration shall be determined by a majority of the General Assembly in joint session. The fact of your suspension together with the reasons therefor and the evidence, documents and information connected therewith will be reported to the next General Assembly.

You will further take notice that under and by virtue of the powers conferred and duties imposed by law upon the Chief Executive, I have appointed L. C. Caldwell, Esq., of the County of Iredell, to fill the vacancy created by your suspension.

Inasmuch as you are understood to deny the power of

the Executive to suspend you from office as provided by the Statutes, I have requested Mr. Caldwell to make demand upon you for the possession of the office and upon your refusal, to bring action therefor to the end that the title to the office may be judicially determined.

(Signed) D. L. RUSSELL,
Governor.

The plaintiff in error declined to surrender his office, and this action was brought on the 5th day of October, 1897, to try the title thereto.

The defendant in his answer, among his various matters of defence, denied generally and specifically the matters alleged against him; alleged that before suspension he had disposed of his interest in the Round Knob property, as he was entitled to do under the statute; and denied that he had anything to do with the employment of his son as agent at Morganton. He further alleged:

27. That the Board of Railroad Commissioners is a Court of Record and the Commissioners are Judges under and by virtue of Article 4, Section 12, of the Constitution of the State by which it is provided, "The General Assembly shall have no power to deprive the Judicial Department of any power or jurisdiction which rightfully pertains to it as a co ordinate department of the Government, but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law in such manner as it may deem best, provide also a proper system of appeals, and regulate by law when necessary the method of proceeding in the exercise of their powers, of all courts below the Supreme Court so far as the same may be done without conflict with other provisions of this Constitution."

28. That by Article 4, Section 30, of the State Constitution it is further provided, "In case the General Assembly shall

establish other courts inferior to the Supreme Court the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may from time to time prescribe, and they shall hold their offices for a term not exceeding eight years."

29. That by Article 4, Section 31, of the State Constitution it is further provided, "Any judge of the Supreme Court or of the Superior Court and the presiding officers of such courts inferior to the Supreme Court as may be established by law may be removed from office for mental or physical inability upon a concurrent resolution of two-thirds of both houses of the General Assembly. The judge or presiding officer against whom the General Assembly may be about to proceed shall receive notice thereof accompanied by a copy of the causes alleged for his removal at least twenty days before the day on which either house of the General Assembly shall act thereon."

30. That the alleged causes of removal set up by the Governor are such as apply to no other judges or presiding officers of courts or any other public officers in the State, and the Governor has no power to remove or suspend any other judge or presiding officer of courts or any other officer not appointed by him. Wherefore the defendant says the Statute and the said action of the Governor deprive him of the equal protection of the laws and are in violation of the Fourteenth Amendment of the Constitution of the United States, and this defendant expressly claims the protection of said Amendment.

31. That, as appears by section 3 of the complaint, the Governor cited this defendant before him to answer the charges preferred against him. This defendant fully answered, and generally and specifically denied the charges. Thereupon the defendant demanded to be confronted with his accusers and to hear and cross-examine the witnesses against him. This was refused and no witness or other evidence was produced; and thereafter the Governor made his decision, by

which he attempted to remove the defendant till the meeting of the General Assembly, early in January, 1899. The defendant submits that this action was without a hearing and without evidence to support it, without any trial and without any right of appeal. Wherefore he says the said action deprives him of his liberty and property without due process of law, and is in direct conflict with the Fourteenth Amendment to the Constitution of the United States, and the defendant expressly claims the protection of said Amendment.

On the trial in the Superior Court the plaintiff in error (defendant below) tendered the following issues and demanded a trial by the jury:

1. Is the plaintiff entitled to the office of Railroad Commissioner?

2. Does the defendant unlawfully intrude into, hold and exercise the office of Railroad Commissioner and Chairman of said Commission?

3. Has the defendant acquired any interest in any way in the Southern Railway Company in violation of law?

4. Has the defendant become disqualified to act as a fair Judge or Commissioner, or has he become in any way disqualified to act?

5. Did the defendant prior to September 1, 1897, sell and convey for a valuable consideration the Round Knob Hotel to R. M. Brown?

6. Did the defendant demand of the Governor that the evidence against him be produced and that he have an opportunity to confront his accusers and cross-examine the witnesses against him?

7. Was said demand refused?

8. Was any evidence produced?

The Court refused to submit the issues to the jury and the defendant excepted.

The Court ruled that the plaintiff below was entitled to judgment upon the pleadings. This ruling was sustained

by the Supreme Court of the State. The plaintiff in error filed the following

ASSIGNMENT OF ERRORS:

First. That the Supreme Court erred in holding that the defendant was not removed or suspended from his office of Railroad Commissioner without due process of law and contrary to the Fourteenth Amendment to the Constitution of the United States.

Second. That the Supreme Court erred in holding that in the removal or suspension of the defendant he was not deprived of the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

Third. That it appears by the record in this case that the Governor made certain charges against the defendant in his letter of August 24th, 1897, and cited him to appear before him on the first day of September, 1897, and show cause in writing, and to make answer and proofs in writing, and to be there in person or by counsel at his election; that the defendant appeared and filed a written denial of all the charges, and demanded to be confronted with his accusers and to hear and cross-examine the witnesses against him; that said demand was refused; that the facts were not in the personal knowledge of the Governor; and that the Governor without evidence and without a trial undertook to find generally that the defendant had violated the Railroad Commission law in some of the particulars mentioned in his letter of August 24th, 1897, set out in the complaint, and that the defendant had not only violated the said act in the specifications set out in the said act, but that he had otherwise within the intent and meaning and words of said act become disqualified to act; and thereupon the Governor undertook to suspend or remove the defendant and deprive him of his office, and appointed the relator, L. C. Caldwell, to fill the same;

that defendant declined to surrender his office, and thereupon this action in the nature of *quo warranto* was brought to oust him therefrom; that in the Superior Court the defendant filed his answer, controverting all the charges made against him and tendered issues covering all phases of the controversy; that the trial Court refused to submit the issues or any issues to the jury, but ruled that the statute and the action of the Governor did not deprive the defendant of his liberties and property without due process of law, and that the plaintiff was entitled to judgment for the possession of the office on the pleadings; that the defendant duly excepted and appealed to the Supreme Court, and the ruling and decision of the trial Court was sustained, and the judgment affirmed.

The defendant says said ruling and decision is erroneous and in violation of the Fourteenth Amendment to the Constitution of the United States.

Fourth. That the defendant is a judge of a court of record under the laws of North Carolina, and no judge or other officer is liable to removal or suspension by the Governor. Moreover the Constitution of North Carolina, Art. 4, Sec. 30, confers the power of removal of judges on the General Assembly for mental and physical inability which this defendant claims is a prohibition against removal by the Governor or Legislature for other causes. The Supreme Court holds that by the action of the Governor the defendant is not deprived of the equal protection of the laws; and the defendant says that the said ruling and decision are erroneous and in violation of the Fourteeth Amendment to the Constitution of the United States.

The facts in No. 559 present but little difference, except that plaintiff in error, S. Otho Wilson, is charged with renting the Round Knob Hotel, &c., which he squarely denied. His term of office expires April 1, 1901.

The Railroad Commission Act, L. 1891, ch. 320, sec. 1, provides:

"That there shall be three Commissioners elected by the General Assembly to carry out the provisions of this act. * * * * Said Commissioners shall not jointly, or severally, or in any way, be the holder of any stock or bond, or be the agent or attorney or employee of any such company, or have any interest in any way in such company, and shall so continue during the term of his office, and in case any Commissioner shall as distributee or legatee, or in any other way, have or become entitled to any stock or bonds or interest therein of any such company he shall at once dispose of the same; and in case any Commissioner shall fail in this, or in case any one of them shall become disqualified to act, then it shall be the duty of the Governor to suspend him from office, and to report the fact of his suspension, together with the reason therefor, to the next General Assembly, and the question of his removal from office shall be determined by a majority of the General Assembly in joint session. In any case of suspension the Governor shall fill the vacancy, and if the General Assembly shall determine that the Commissioner suspended shall be removed, then the appointee of the Governor shall hold until his successor is elected and qualified as hereinbefore provided, but if the General Assembly shall determine that the suspended Commissioner shall not be removed from his office, then the effect shall be to reinstate him in said office. The person discharging the duties of said office shall be entitled to a salary for the time he is so engaged, but a Commissioner who is suspended shall be allowed the salary during his suspension in case he should be reinstated by the next General Assembly."

ARGUMENT.

I submit that this is not a proper case to dispose of in this summary way.

I.

The motion to dismiss cannot be sustained, because the jurisdiction of the Court is clear and undoubted. *Foster* v. *Kansas*, 112 U. S., 201; *Kennard* v. *Louisiana*, 92 U. S., 480.

II.

The motion to affirm is not allowed unless there is at least some colorable right to dismiss. *Davies* v. *Corbin*, 113 U. S, 687; *Whitney* v. *Cook*, 99 U. S., 607.

This rule is departed from sometimes, where the question has been well settled by other decisions of this Court, or if the reasons for taking the writ of error are frivolous, or if it was taken for delay only. *Foster* v. *Kansas, supra; City of Chanute* v. *Frader*, 132 U. S., 210 (33 L. Ed., 345).

It becomes necessary for me, therefore, to discuss fully the merits of the case.

III.

The statute and the action of the Governor violate the Fourteenth Amendment to the Constitution of the United States, in that they (one or both) deprive the plaintiff in error of his liberty (or privileges) and property without due process of law.

We say that the proceedings before the Governor lacked the essentials of due process of law in the following particulars:

1. Charges were made by the Governor, not upon his own knowledge, but on information and newspaper reports. These were specifically denied. The Governor could not pass upon

them without evidence. He declined to produce any evidence, and the answer, which must be taken as true for the purpose of this hearing, squarely alleges that he acted without evidence. The defendant asked an opportunity to try this question, and tendered issues upon it.

2. There was no opportunity allowed the defendant to confront his accusers or to cross-examine the witnesses.

3. There was no finding of any specific fact by the Governor. He says that defendant is guilty of some of the charges made in his letter and in other particulars within the words and intent and meaning of the act has become disqualified to act. So that the defendant cannot yet know for what he is condemned.

4. The defendant has never been tried according to the law of the land.

5. He had no opportunity of appeal.

6. The Governor is not a court, and therefore the whole proceeding was without authority. Under the Constitution of the State, he had no jurisdiction, and therefore the statute in this respect and his action are void.

7. That the method was not consistent with the accusatorial methods required by the genius and spirit of our law, in that the Governor revealed no accuser, and therefore necessarily was himself accuser and judge.

The solution of this question of due process depends on whether the method of procedure was in substantial accord with the law and usage in England before the Declaration of Independence and in this country since it became a nation, in similar cases.

Lowe v. Kansas, 163 U. S., 81.

"There is nothing," says Judge Cooley, "technical, or, we think, obscure, in the requirement that process which divests property shall be due process of law. The Constitution makes no attempt to define such process, but assumes that custom and law have already settled what it is. Even in

judicial proceedings we do not ascertain from the Constitution what is lawful process, but we test their action by principles which were before the Constitution, and the benefit of which we assume that the Constitution was intended to perpetuate. If there existed, before that instrument was adopted, well known administrative proceedings which having their origin in a legislative conviction of their necessity, had been sanctioned by long and general acceptance, we are no more at liberty to infer an intent in the people to prohibit them by implication from any general language, than we should be to infer an intent to abridge the judicial authority by the use of similar words. The truth is, the bills of rights in the American Constitutions have not been drafted for the introduction of new law to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory, and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation."

Weimer v. Bunbry, 30 Mich., 201, 213.

Many cases might be cited to show the practice in England. A number of them are collected in *Dullam* v. *Wilson*, *infra*.

In *King* v. *Gaskin*, 8 Term. Rep., 208, a parish clerk removed by the rector was restored by *mandamus* because it did not appear that he had been summoned to answer before he was removed. Said Lord Kenyon, Ch. J.: "If we were to hold this return to be sufficient we should decide contrary to one of the first principles of justice, *audi alteram partem*. * * * It is to be found at the head of our criminal law that every man ought to be heard before he is condemned; and I should tremble at giving way to this principle." Such was one of the grounds in *Bagg's case*, 11 Coke, 99.

In *King* v. *Free Fishermen of Faversham*, 8 T. R., 352, the return to the *mandamus* was quashed and the prosecutor re-

stored because it appeared that the charges were not proved. See also, *Ex parte Ramshay*, 18 Q. B., 173, 189, where Lord Campbell states the different things that will vitiate the removal—among others: "The Chancellor has authority to remove a judge of a county court only on the implied condition prescribed by the principles of eternal justice that he hears the party accused; *he cannot legally act upon such an occasion without some evidence being adduced to support the charges.*"

In *Kennard* v. *Louisiana*, 92 U. S., 480, which was a question as to the removal of a judicial officer, the Court said: "It is substantially admitted by counsel in the argument that such is not the case (*i. e.*, the officer was not removed without due process), if it has been done 'in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights' We accept this as a sufficient definition of the term 'due process of law' for the purposes of the present case. The question before us is, not whether the Courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution."

There the officer had a regular trial in a court of competent jurisdiction, with an appeal to the Supreme Court. "He had an opportunity to be heard before he could be condemned." "The remedy provided was certainly speedy; but it could only be enforced *by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties.*" This was held due process of law. But it is difficult to believe that it would have been so held had the Judge in that case been denied a day in court—a trial and an appeal.

"In *Davidson* v. *New Orleans* it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person

should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the Fourteenth Amendment. * * * Such an enactment would not receive judicial sanction in any country having a written Constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated not as an exertion of legislative power, but as *a sentence—an act of spoliation.*"

Chicago, Burlington and Quincy Rail road *v.* Chicago, 166 U. S., 226, 235.

The same principle applies if the sentence comes from an executive officer. He has no more right to deprive one of his property than the Legislature.

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislature, executive and judicial authorities, and, therefore, whoever, by virtue of public position under a State government, deprives another of any right protected by the amendment against deprivation of the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or evade it.'"

Chicago, &c., R. *v.* Chicago, 166 U. S., 233, 234.

"No judgment of a Court is due process of law, if rendered without jurisdiction in the Court, or without notice to the party.

"The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this Court, 'mean a course of legal proceedings according to

those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit.'"

Scott *v.* McNeal, 154 U. S., 34, 46.

A thorough discussion of the whole question can be found in *Dullam* v. *Willson*, 51 Amer. Rep, 128 In that case the Governor being expressly empowered by the Constitution removed a trustee of the Michigan Institution for Educating the Deaf and Dumb for "official misconduct and habitual neglect of duty." No notice was given to the defendant Willson before his removal. In the notification of removal the Governor stated to defendant that he had removed defendant for his "official misconduct and habitual neglect of duty," and that he would lay before the Legislature the reasons for such removal at its next session in detail. The Governor appointed Dullam trustee to fill the vacancy occasioned by such removal, and Willson declining to surrender his office, an information in the nature of *quo warranto* was brought by Dullam to test the title to the office.

The Michigan Constitution expressly granted to the Governor the right of removal. So that the case is a very important one as to the method of exercising the power, where it is conferred. It is the more important because Mr. Cooley was then Chief Justice of the Court Said Champlain, J., in delivering the leading opinion: "Unless it is the manifest intention of the section under consideration that the proceedings shall be *ex parte* as well as summary, a removal without charges, notice and an opportunity for defence cannot be upheld. The exercise of such a power, in such manner, would be too despotic for any attempt at vindication in a country which boasts of the utmost liberty compatible with the safety of the State, and is entirely opposed to the genius of our free

institutions. I do not think the people, when they adopted this amendment, intended or supposed that they were placing such unlimited power in the hands of any man. If it exists, it places it in the power of the Governor, at his mere will or caprice, to remove all State officers, except legislative and judicial; and to fill their places with his own partisans, thus revolutionizing the whole administration of the State, and defeating the express will of the people who elected him. It is no argument to say it may never be done. It is sufficient to know that it could be done, and that the people in adopting the amendment never intended to grant the power by which it might be done.

"The history of judicial proceedings shows that it has been frequently the case that officers, invested with the power of removal for specified cause, have attempted its exercise in an *ex parte* and summary manner, not through any wrong motive, but from a misconception of the method in which such power should be exercised." Then are cited divers cases, in which the right to a hearing is discussed.

"There must be charges specifying the particulars in which the officer is subject to removal. It is not sufficient to follow the language of the Constitution." *Ib.*, p. 139.

Again, he speaks of the cases relied on to show that no notice was required, and that the action of the executive was final and conclusive, and says, "they appear to him to be opposed not only to the decided weight of authority, but also to the fundamental principles of justice."

Campbell, J., also filed an able opinion, in whichhe denies the power of the Governor to remove, even under the Michigan constitution, until the ground of removal is established by a trial by jury or by impeachment.

In speaking of the contention that the action of the Governor must be respected as the act of an independent co-ordinate department of the government, subject to an appeal and that it was not within the power of the judiciary to review or sit in judgment upon the action of the executive, he says:

"It is undoubtedly true that no Court can review the lawful discretion of anybody that is not a Court, and that the executive stands in this respect on the same footing with all other persons and bodies. But it is equally true that private rights cannot be subjected by legislative, executive, or any other authority, to the unregulated discretion of any one. Legal rights can only be divested by such measures as are classed under the law of the land as due process of law. Courts, in determining whether vested rights have ceased to exist, do not act necessarily or usually as appellate tribunals, whose judgments operate on the tribunals or persons whose invasions of right are complained of. They may or may not do so. But, in a constitutional government, the action of all persons, officials or private, which is in violation of Constitutional rights, is simply null and void, and usually needs no reversal. And the action of any department of government, whether legislative, executive or judicial, beyond its jurisdiction, or against the constitutional limitations of its authority, is in law the same as if there had been no action, and cannot be recognized as having legal effect * * * No executive authority exists outside of its legal boundaries. All officers must be created in accordance with law. Unless they are held during the pleasure of the executive, or subject to removal at his will, he cannot interfere with them, except as the law provides; AND, IF HIS RIGHT DEPENDS ON CONDITIONS, those conditions must be determined in some legal way. No right can be subject to his uncontrolled discretion.

"And where, as is sometimes the case, he has the duty of inquiry and decision, he has no power to decide without a hearing any controversy involving private rights. We are bound in this case to ascertain whether he has acted in accordance with any authority lawfully vested in him, and decide accordingly." *Ib.*, 141, 142.

"And it has been uniformly held by this Court that where provision has been made—as under the Constitution it may be for removal of local officers for cause by other bodies—

there must be the same definite charges and fair hearing whether expressly required by statute or not." *Ibid*, 142.

"If the Governor can, as claimed by relator, pass in person upon charges against State officers for malversation in office without a conviction elsewhere, under the provisions of the Constitution or of this statute, inasmuch as he is only allowed to do it for causes specified, his action is as distinctively judicial as that of the other removing bodies; and it must appear in its face to be for definite causes determined upon a legal showing after a due hearing. A judgment is void which does not show on its face that the judicial body rendering it had both jurisdiction over the person and jurisdiction upon legal charges.

"That removals for cause are judicial acts, and that they must be disregarded whether appealable or not, if not conforming to jurisdictional requisites, has been settled so long, not only in this State, but by the common law doctrines and by the general agreement of Courts, that there is no room for serious controversy." *Ib.*, 143.

After speaking of removals in England, where "Parliament has power to vest any class of powers anywhere it pleases," he proceeds: "In most of these cases there is no appellate jurisdiction anywhere. But in every case of removal for cause the Courts of law have exercised the right of passing upon the legality of the removal, and have invariably treated it as void unless exercised conformably to the requirements of jurisdictional sufficiency. And whenever a party unlawfully removed has been actually shut out by his associates or others from acting, a *mandamus* has issued to restore him, and has been made peremptory unless the proceeding of removal *contained affirmative evidence of sufficient charges sustained on a proper hearing.*

"It has always been held that general conclusions or conclusions on general charges were not enough, but the facts on which the judgment was based must appear either in specific charges or in specific findings, on which the party has been *heard on legal proofs*," (citing many English cases).

"These cases not only require a proper hearing on proper charges, but hold that those charges must consist of distinctly stated facts, and not general charges of wrong or neglect, so that it can be determined, as a matter of law, whether what the removing body treats as wrong is within the legal quality of wrong. * * * * * *

It is also held that the case must appear to have been proved by evidence, and that a mere finding of results on alleged personal knowledge is not enough." *Ib.*, 144.

"This is not merely antient doctrine. The safeguards against wrong and the right to have charges determined by due process of law, which is distinctly asserted by Lord Mansfield in Burrows, as the basis of these rulings, are as clearly recognized under the grant of special remedies as in any other." *Ib.*, 145.

"The fact, then, that the statute and the Constitution, in giving the Governor power to remove, prescribe no methods of examination, can in no way relieve him from the necessity—even if he is to pass personally on the facts—of having specific charges of misconduct communicated to the officer, and established by proof, with a full opportunity to the respondent to examine and cross-examine witnesses, and be heard on the facts and the law."

Ib., 145.

See People *v.* Therrien, 80 Mich., 187, which reaffirms this case in an able opinion; also Field *v.* Com., 32 Pa. St., 352.

The Governor cannot proceed without evidence, unless the matter is within his own knowledge or discretion.

Throop on Pub. Officers, 345, 346, 362–365.

Mechem on Pub. Officers, secs. 454, 455.

1 Dillon Mun. Corp., secs. 250, 255.

High Ex. Legal Rem., 68, 69.

Dullam *v.* Willson, 53 Mich., 392 (51 Amer. Rep., 128).

Hallgren *v.* Campbell, 82 Mich., 255 (21 Amer. St. Rep., 557).
People *v.* Stuart, 74 Mich., 411 (16 Amer. St. Rep., 644).
People *v.* Nichols, 79 N. Y., 582.
People *v.* Campbell, 82 N. Y., 247.
People *v.* Brooklyn, 103 N. Y., 370.
People *v.* Brooklyn, 106 N. Y., 64.
Lease *v.* Freeborn, 35 Pac., 817.

The rule is clearly stated by Dillon, *supra:* "Where an officer is *appointed during pleasure*, or where *the power* of removal *is discretionary*, the power to remove may be exercised *without notice or hearing*. But when the appointment is *during good behavior*, or when the removal can only be for certain *specified causes*, the power of removal cannot, as will presently be shown, be exercised, unless there be a charge against the officer, *notice* to him of the accusation, and a *hearing of the evidence in support of the charges*, and an opportunity given to the party to make defence."

Sec. 250.

"There must be a *charge*, or charges, against him, *specifically stated*, with substantial certainty; yet the technical nicety required in indictments is not necessary. And *reasonable time and opportunity* must be given to answer the charges and to produce his testimony; and he is also entitled to be heard and defended by counsel, and *to cross-examine the witnesses, and to except to the proofs against him. If the charge be not not denied, still it must, if not admitted, be examined and proved.*"

Ibid., sec. 255.

Right along the line of this contention is the careful and exhaustive discussion in *Hovey* v. *Elliott*, 167 U. S., 409. Bearing in mind that the Governor is not a court; that he himself declared that he had no power to subpœna wit-

nesses; that upon an allegation and a denial, the facts not being within his personal knowledge, and his action being based on letters of others and newspaper reports, he declined to produce any evidence, but acted without evidence and therefore necessarily without opportunity for consideration, we must recognize the striking pertinency of these extracts from that opinion. The defendent in the original case was notified—summoned—as here; but his answer was stricken out for contempt; and the question was "whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party to answer or strike his answer from the files, *suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing*, on the theory that he has been guilty of contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

"In *McVeigh* v. *United States*, 11 Wall., 259, the Court, through Mr. Justice Swayne, said (p. 267):

'In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. * * * The liability and the right are inseparable. A different re-

sult would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.'

"And quoting with approval this language in *Windsor* v. *McVeigh*, 93 U. S., 274, the Court, speaking through Mr. Justice Field, again said (pp. 277, 278):

'The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the Court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made; it is a summons to him to appear and speak, if he has any thing to say, why the judgment sought should not be rendered. *A denial to the party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and defective proceeding had better be omitted altogether. It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard.* In the present case, the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a de-

cree thus rendered with moderation; it was, in fact, a *mere arbitrary edict, clothed in the form of a judicial sentence.*" 167 U. S., 413–415.

The Court then, through Mr. Justice White, cites many English cases, closely in the line of my contention; and also Story's declaration that the due process clause "in effect affirms the right of trial according to the process and proceedings of the common law." (p. 417.)

So on p. 418: "In *Galpin* v. *Page*, 18 Wall, 350, the Court said (p. 368): 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his say in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered.' And it quotes from Judge Cooley: 'The definition here given (Mr. Webster's) is apt and suitable as applied to judicial proceedings, which cannot be valid unless they '*proceed upon inquiry*' and 'render judgment only after trial.'" P. 418.

Again (p. 445): "Looking at the substance and not the form of the decree in the case of *Hovey* v. *McDonald*, upon which the rights of the plaintiff in error depend, it is plain that the judgment was substantially one without a hearing, for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right either to appear or to be heard in his defence? As was said by this Court in *Adams* v. *Postal Telegraph Cable Co.*, 155 U. S., 689, 698: 'The substance and not the shadow determines the validity of the exercise of the power.'"

"There is no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party, and rendering a decree by refusing to

permit a defendant to be heard in his defence or to consider the merits of a sufficient defence, and, indeed, by striking the pleading containing such defence from the files."

So in *Chicago &c. Railroad* v. *Chicago*, 166 U. S., 226, it is said (p. 234-235): "Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defence..... But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of th tatute prescribing forms of procedure in the courts, and giv ıe parties interested the fullest opportunity to be heard, a yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance not to form."

Of what avail is notice if the Governor may assume the truth of a matter of which he is totally ignorant, and ignore all denials—decline to produce evidence—decline to reveal the accuser—decline to allow him to be cross-examined—ignore every pretence of hearing the proofs, and yet suspend?

The Governor must make specific charges and find on them. He cannot suspend for other causes than those assigned. The power to suspend is special, and must be strictly pursued.

Throop on Pub. Officers, sections 362, 379, 383, 385.
Dullam *v.* Willson, *supra.*
Wellman *v.* Board Met. Police, 84 Mich., 558.
People *v.* Therrien, 80 Mich., 187.
State *ex rel.* Dennison *v.* St. Louis, 90 Mo., 187.
State *v.* Duluth, 53 Minn., 238 (39 Amer. St. Rep., 595.)
Field *v.* Com., 32 Pa. St., 478; Mechem Pub. Off., 450–453.

The Governor has no right to order an investigation except upon specific charges; nor can he remove after such investigation, unless upon such a showing and record of the proceedings as will show to the world and to the accused for what particular act or acts of misconduct he has forfeited his office and been removed therefrom.

People *v.* Therrien, 80 Mich., 187, 190.

There is no specific finding of facts from which the defendant may know of what he is convicted.

For example, J. W. Wilson cannot know whether he is beheaded because of the Round Knob hotel matter, or because of his son's being employed as railroad agent "for his accommodation," or for some other "disqualification." The importance of a specific finding is apparent, when we consider that the son was appointed in 1891 and J. W. Wilson was elected in 1893. There seems to be no dissent in the courts from the proposition that an officer cannot be removed or suspended for reasons existing at the time of his election.

Doyle *v.* Raleigh, 89 N. C., 133.

Ellison *v.* Raleigh, 89 N. C., 125.

Speed *v.* Detroit, 98 Mich., 360 (39 Amer. St. Rep., 555).

Rex *v.* Mayor, etc., of Doncaster, Sayers, 37.

Again: Maj. Wilson acquired the hotel property in 1891. Is he suspended for that? or for having a joint interest with Col. Andrews? or for renting it out? or for having some arrangement or understanding with the Southern Road that they will stop and take meals at the table of the lessee? It is not for all of the things specified because it is only found that *some of them are true.*

Again, the Governor, in his letter to Maj. Wilson, summarizes the matter as follows:

"If they or the material substance of them be true—as to which I am expressing no opinion—then the questions to be determined are as follows:

"First. Have you acquired any interest in any way in such company in violation of law?

"Second. Have you become disqualified to act as a fair judge or commissioner?"

There is no finding by the Governor which enables us to know of which charge he convicts.

The Governor may be reviewed.

Mechem on Pub. Officers, secs. 450–452, 456.
People *v.* French, 110 N. Y., 494.
Evans *v.* Populus, 22 La. An., 121.
19 Am. & En. Enc., 562 p.*

This is necessarily so, inasmuch as he must proceed for cause, and not as matter of discretion. If the cause does not exist, he has no jurisdiction.

People *v.* Therrien, 80 Mich., 187.

Said Lord Mansfield, in *Rex* v. *Warren*, Clerk: "Though the minister may have a power of removing him on a good and sufficient cause, he can never be the sole judge and remove him *ad libitum*, without being subject to the control of this Court."

1 Cowp., 370.

"To the proposition that removing boards perform acts which are judicial in their nature, we readily assent. They must hear and determine, when the power is limited to removals for cause. So must boards of review, auditing boards, highway and drain officers, pardon boards, and in fact nearly every officer who has duties to perform; and it is also true that the action of all of these is subject to review in courts of justice." *Fuller* v. *Attorney General*, 98 Mich., 104.

Lastly,

"The public accusatorial trial is another element of the independence of the law, as it is one of the efficient protections of the citizen."

Lieber Civil Liberty and Self-Government, 216.

"We consider that the accusatorial procedure, carried out with consistency and good faith, requires that the accusation itself be not made by the executive, but upon information, by whomsoever made, through an act which itself includes a guarantee against frivolous or oppressive accusation."

Ib., 219

"On the other hand the Judge should remain, during the trial, mere Judge, and never become inquirer or part of the prosecution."

Ib., 220.

IV.

The opinion of the Court below is unsound in many of the arguments on which it is based.

To cite a few of them:

1. It makes the case of *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How., 272, the leading authority for its position on the subject of due process of law. But it is elementary learning that the doctrine of that case is exceptional—pertains to the revenue only, and is the law because such was the law in England in the Exchequer, in matters of debt due the crown. The proceeding was due process there, and so it is due process here. I have already shown how different was the practice in England in matters of office. "Imperative necessity has forced a distinction between *such claims* (matters of revenue) and *all others*, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties; but always in some way observed and yielded to."

Murray *v.* Hoboken, *supra.*

The underlying principle strongly supports my theory. The history of the law made the proceedings due process there. The history of the law prevents the proceeding from being due process here.

"We are bound," says Mr. Justice Brown, delivering the opinion of the Court in *Mattox* v. *United States*, 156 U. S., 243, "to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guarantees of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit."

2. The opinion seeks to find an authority against my contention in *Ex parte Wall*, 107 U. S., 265. But the difference between the two cases is wide and fundamental. Wall was disbarred by the Court, after the examination of one witness There was evidence for the consideration of the Court. Here an executive officer removes, in the absence of evidence—without evidence, in the face of a denial of the charges.

3. The opinion says that the plaintiff in error has not been denied access to the Courts. That he did not appeal from the action of the Governor nor seek the aid of the Courts, but forcibly retained possession of an office from which he had been rightfully suspended, and forced the defendant in error to seek redress in this action. That the Governor in his notification of suspension, distinctly recognized the right of the plaintiff in error to have its legality tested in the Courts, and made no attempt to dispossess him. That the defendant in error has sought possession only "by the law of the land," as shown by the bringing of this action.

Let us analyze this a little:

(1) No appeal lies from the action of the Governor, because he is not a court, and the Legislature has marked out no body to appeal to. Appeals are of statutory creation.

(2) The Supreme Court itself holds that the action of the Governor is not reviewable. (P. r., page 37.)

(3) The plaintiff in error had "due process" because the Governor recognized his right to have its legality tested in the Courts. So! The plaintiff in error has a right to have the legality of his removal tested in the Courts. But when he is brought before the Court, he is summarily cut off—the Court declines to hear and pass on a single allegation he makes. And this is due process! Such is not the language of the law.

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that in the famous language of the Massachusetts Bill of Rights, 'the government of the commonwealth may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the

means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Yick Wo. *v.* Hopkins, 118 U. S., 356, 370.

Said Pearson, C. J., in delivering the opinion in *Barnes* v. *Barnes*, 8 Jones (53 N. C.), 366: "Suppose the Legislature should pass a statute that the Governor, in the recess of the General Assembly, shall not embody the militia of the county of Rowan, or shall not embody the militia of the State; or shall not do any act of his office, would the legislative and executive powers of the government be kept separate and distinct from each other? Or suppose the Legislature should pass a statute, that the Supreme Court shall not give judgment and issue execution in the case of *Barnes* v. *Barnes*, or shall not give judgment and issue execution in any actions for debts due on bonds, promissory notes, etc., where in the trial of the case, in the Court below, the intervention of a jury was required, or shall not give judgment and issue executions in any suit or action, founded either on contract or tort, brought before it by appeal from the Superior Court, would the legislative and supreme judicial powers of government be kept separate and distinct? In other words, would not the assertion and exercise of this power on the part of the Legislature destroy the independence of the executive and supreme judicial powers of the government, and subvert the government established by the Constitution, by centering all powers in the legislative department, and making a despotism, instead of a free government where the powers are divided and given to separate departments, each acting in its appropriate sphere, as a check on the other?

"Such, it seems to us, would be the result of the concession of the power assumed by the Legislature in the passage of the statute under consideration.

"The result is not avoided by the fact that the restraint on

the Courts is confined, by the statute, to actions for debts and matters of contracts, and that it is not absolute, but merely until 'otherwise provided by law'—for it is a question of power. If the Legislature has the power to impose this restraint on the courts until otherwise provided by law, it has the power to do so without the provision to remove the restraint when we have better times and it shall be easier for men to pay their debts; and, if it has the power to impose this restraint on the courts, in respect to matters of contract, it has the power to extend it to matters of *tort*, and then a man who is stronger than I may take my negro or my horse, or drive me out of my house, and the laws of my country will give me no redress, *because the temple of justice is closed. A power to suspend or to abolish the administration of justice cannot exist in a free government. Without law and tribunals to administer it there can be no government; it is anarchy, which is worse than despotism;* and yet the power involved in the passage of the statute necessarily, and by logical deduction, leads to that result.

"If there be such a power in the Legislature, we are, with all our boasted free institutions, infinitely behind the monarchy of England in respect to the protection of our rights of person and rights of property. Blackstone, the learned commentator on the Constitution and laws of England, in Vol. 1st, page 102, says: 'A third subordinate right of every Englishman is that of applying to the courts of justice for the redress of injuries. Since the law of England is the supreme arbiter of every man's life, liberty and property, courts of justice must, at all times, be open to the subject and the law be duly administered therein. The emphatic words of Magna Charta are these: "*Nulli negabimus aut differemus rectum vel justiciam,*" and therefore every subject for injury done to him *in terris, in bonis, vel persona,* by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law and have justice and right for the injury done to him, fully without sale, freely without any denial, and speedily without delay.'"

The fundamental vice of the statute under consideration is that the property rights of a railroad commissioner in his office are temporarily placed under the control of the Governor, who is given the power of suspension for cause, which necessarily presupposes an adjudication somewhere of the existence of the cause; and then the Legislature is to act finally; and nowhere in the scheme marked out by the Act is there a mention of the Courts.

The founders of our government looked very carefully to the preservation of the liberty and rights of the people. They were careful to establish a government of checks and balances, and to guard safely against the intrusion of one department upon the domain of the other. Said Chief Justice Ruffin in *Hoke* v. *Henderson*, 4 Dev. (15 N. C.), 1:

"The great and essential differences between governments, as distinguished from one another by their constitutions, consist in the greater or less personal liberty of the citizen, and the greater or less security of private right, against the violence or seizure of those who are the government for the time being. It is true, the whole community may modify the rights which persons can have in things, or at their pleasure abolish them altogether. But when the community allows the right and declares it to exist, that constitution is the freest and best which forbids the government to abolish the right, or which restrains the government from depriving a particular citizen of it. In other words, public liberty requires that private property should be protected even from the government itself.

"The people of all countries who have enjoyed the semblance of freedom, have regarded this and insisted on it as a fundamental principle. Long before the formation of our present Constitution it was asserted by our ancestors on various occasions; and, in one sense of it its vindication produced the revolution. At the beginning of that struggle, while the jealousy of power was strong, and the love of liberty and right was ardent, and the weakness of the individ-

uel citizen against the claims of unrestricted power in the government was consciously felt, the people framed the Constitution of this State, and therein declared that no freeman ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or *deprived* of his life, liberty or *property*, but by the law of the land. (Bill of Rights, sec. 10). By the fourth section it is declared that the legislative, executive and supreme judicial powers of government ought to be forever separate and distinct from each other.

"In absolute governments, whether hereditary or representative, the division of the powers of government is unimportant, because that body in which resides the superior authority can, at will, make it supreme and absorb all other departments. It does not follow, therefore, that because the British Parliament, whose supremacy is acknowledged, decides questions of private right and puts that decision, as it does its other determinations, into the form of a statute, that whatever it does is legislative in its nature. It can adjudicate, and often does substantially adjudicate, when it proposes to enact new laws. That faculty is expressly denied to our legislature, as much as legislation is denied to our judiciary. Whenever an act of the Assembly, therefore, is a decision of titles between individuals, or classes of individuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right, which is not a legislative but a judicial function. It may not be easy to distinguish those powers and to define each, so that an act shall be seen at once to be referable to the one or the other. But I think that where a right of property is acknowledged to have been in one person at one time, and is held to cease in him and to exist in another, whatever may be the origin of the new right in the latter, the destruction of the old one in the former is *by sentence*. If the act of 1832 had been confined in its terms to the clerkship of Lincoln, its judicial character would

be obvious. If it had said that Mr. Henderson had forfeited his office, or had conveyed it to Mr. Hoke, or that after forfeiture Mr. Hoke had been duly appointed, or was by that act appointed, or had been elected by the citizens and was approved by the legislature, and therefore the one should go out and the other go in, it would be plainly as respects Mr. Henderson's title, an adjudication against it, although the subsequent investment of the title in Mr. Hoke would be legislative. Is the act the less of the former character because it does not recite an abuse by Henderson, or other cause of forfeiture? Is not such forfeiture assumed in it? For it is impossible, in the nature of things, that Mr. Hoke can be rightfully put in, unless the other be rightfully put out; and Mr. Henderson cannot rightfully be deprived, unless the thing he claims was never property, or has ceased to be so, or unless he has parted from the property he had in it by forfeiture or otherwise. * * * If valid it (the act) compels the Courts to deprive the officers *without further enquiry before a jury* into the fact or legal sufficiency of any cause of forfeiture or removal." See, also,

Wood *v.* Bellamy, 120 N. C., 212.

In *Vann* v. *Pipkin*, 77 N. C., 408, it is said by Bynum, J., delivering the opinion, "Until the office shall be declared vacant by some competent tribunal authorized by law to declare a vacancy, the Sheriff may rightfully hold the office until the end of his term. * * * Nor can such a vacancy be declared until the alleged delinquent shall have had due notice and a day in Court, if in reach of its process. A forfeiture of office and a vacancy can be judicially declared, only after trial and culpability established. The Sheriff has a property in the emoluments of his office, of which he cannot be deprived but by the law of the land.

Const., Art. 1, § 17.
Hoke *v.* Henderson, 4 Dev., 1."

So in *People* v. *Heaton*, 77 N. C., 18, a *quo warranto* was brought and the cause of forfeiture (failure to keep office open on Monday) judicially established.

Again, in *State* v. *Norman*, 82 N. C., 687, it was expressly held that forfeiture of office of Clerk for failure to keep open his office on Monday, can only be enforced by proceedings in the nature of *quo warranto*.

That case is the more striking as an authority, because the defendant had been indicted and convicted, yet the Court held he could not be deprived of his office save by a proceeding in the nature of a *quo warranto*.

If the plaintiff in error had become disqualified to act, it was easy to institute a proceeding in the nature of *quo warranto*, and have him removed.

Code, Sec. 607, (2) expressly provides:

"An action may be brought by the Attorney General in the name of the State, upon his own information, or upon the complaint of any private party, against the parties offending in the following cases:

(2) When any public officer, civil or military, shall have done or suffered an act which, by law, shall make a forfeiture of his office."

All such actions are tried at the first term of the Court, and the remedy is very summary and complete.

The Code, sec. 616.

But if this is not true, the plaintiff was certainly entitled to relief somewhere from the arbitrary action of the Governor. And the *quo warranto* instituted to test the right was the appropriate place.

4. The opinion below recognizes the definition in *Leeper* v. *Texas*, 139 U. S., 462, 467: "Law, in its regular course of administration through *courts of justice*, is due process, and when secured by the law of the State the constitutional requirement is satisfied, and that due process is so secured

by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

Yet here law has never been administered through any court. An executive officer passes sentence, and the courts refuse to review his action. And if the construction of the State Court that although the statute anthorizes the Governor to remove for cause, he may remove without evidence and therefore without cause, and still the courts cannot inquire into his action—if this does not subject the individual to the arbitrary action of the powers of government, plain English words have lost their meaning.

5. The opinion cites approvingly *Kennard* v. *Louisiana*, 92 U. S., 480. But there the plaintiff in error had a trial in Court, with an appeal to the Supreme Court.

"From this it appears that ample provision has been made for the trial of the contestants before a *court of competent jurisdiction;* for bringing the party against whom the proceeding is had before the Court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the Court; for an appeal from this judgment to the highest Court of the State, and for hearing and judgment there. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the Act. The remedy was certainly speedy, but it could only be *enforced* by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties."

There the burden of proof was placed upon the plaintiff in error by the statute. Not so here. There was given by the statute provision for a notice, returnable in twenty-four hours. No provision for notice is in our statute. This, of itself, is held by some courts to vitiate the statute.

Stuart *v.* Palmer, 74 N. Y., 183.
Kuntz *v.* Sumption, (Ind.), 2 L. R. A., 655.
Del Castillo *v.* McConnico, 18 Sup. Ct. Rep., 229.

There was no opportunity for the deliberation of the Court. For in the absence of evidence there was nothing to deliberate upon. There was no opportunity for appeal.

6. The opinion and the brief of defendant in error seem to labor under the idea that the plaintiff in error claims that the Federal Constitution entitles him to a jury trial. No such contention is or has been made. But we say that he is entitled to a trial in a court of justice. This right is guaranteed to him by the Fourteenth Amendment, as I have endeavored to show.

7. But it is argued that the defendant accepted office with notice of the provisions in the statute, or subject to those conditions; and that these provisions are part of the contract. But the defendant accepted his office with notice also of the higher law contained in the Constitution. He accepted with notice that the Constitution controlled the statute and blotted from the contract every clause inconsistent with its terms. An enactment which is opposed to the Constitution is void—it is no law at all.

Cooley Const. Lim., 4.
Houston *v.* Bogle, 10 Ired. (32 N. C.), 496.

Not every condition in a contract is capable of enforcement. A promise in a note or mortgage to pay usurious interest is a condition of the contract, but it is not enforced by the courts. A might promise B to pay him one hundred dollars for a horse in one year's time, but if, in the meantime, A shall slay B's enemy or burn his barn, the amount shall be reduced to fifty dollars. No Court would enforce such an agreement. So no Court can enforce unconstitutional provisions.

So an agreement in a policy of insurance to determine by arbitration only the amount of damages is valid, but an agreement which prevents a party from coming into a court

of law—*which ousts the courts of their jurisdiction*—cannot be supported.

Manufacturing Co. *v.* Assurance Co., 106 N. C., 28, and cases cited.

Hamilton *v.* Insurance Co., 136 U. S., 242.

Moreover, the plaintiff in error contracted that if he were guilty of the things alleged against him, the Governor might suspend, but he did not contract to shun the courts of his country and abide by the arbitrary edict of the Governor, guilty or not guilty; nor did he ever contract that he would not ask a trial or seek to reverse arbitrary action.

Where the State Court held that there could be no inquiry as to the reasonableness of rates established by a Railroad Commission, it was said: "This being the construction of the statute by which we are bound in considering the present case we are of the opinion that, so construed, it conflicts with Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor as an absolute finality the action of a Railroad Commission which, in view of the powers conceded to it by the State Court, cannot be regarded as clothed with judicial functions or possessing the machinery of Courts of justice."

Chicago &c. R. Co. *v.* Minnesota, 134 U. S., 418 (per Blatchford, J.)

So in the present case, James W. Wilson is practically deprived of his office, no matter how the General Assembly rules. For it convenes about the first of January, 1899, and lasts sixty days; and Wilson's term expires on the 1st of April, 1899.

"As the Courts will not interfere with the action of the

Legislature, so it may rightfully be presumed that the Legislature never intends to interfere with the action of the Courts, or to assume judicial functions to itself. It may be presumed to have left to the Courts the redress of the private wrongs done by the Omaha Company. * * * If the disabled condition of the Postage Company has been brought about by the wrongs of the Omaha Company, the Courts are open, and the accepted maxim in those thribunals is, that where there is a wrong there is a remedy. It thus subserves the interests of the public and leaves the redress of the wrong to that department which has not only the requisite jurisdiction, but also the appropriate machinery for ascertaining the amount of injury, and enforcing the due compensation."

Angle *v.* Chicago &c. Railway, 151, U. S., 1, 20, 21.

It is worthy of note that the very section of the Constitution of North Carolina under which the Railroad Commission was established, (Art. 4, Sec. 12) begins "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government."

V.

The Statute and the action of the Governor violate the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiff in error of the equal protection of the laws.

Every man has a right to be tried by the courts of his country. Nowhere in this statute is there mention of a court. Nowhere is there an opportunity to try the question of guilt or innocence by any judicial officer. The executive deprives him of his property in the first instance, and the legislature may do so in the second. See the striking remarks of Pearson, C. J., in *Barnes* v. *Barnes*, *supra*.

No such provision of law is applicable to any other men in the land. No body else is deprived of a trial by the courts.

The sections of the Constitution of North Carolina bearing on the question are as follows:

"The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other."

Const., Art. 1, Sec. 8.

"The Executive Department shall consist of a Governor, in whom shall be vested the supreme executive power of the State," etc.

Const., Art. 3, Sec. 1.

"The judicial power of the State shall be vested in a court for the trial of Impeachments, a Supreme Court, Superior Courts, Courts of Justices of the Peace, and such other Courts inferior to the Supreme Court, as may be established by law."

Const., Art. 4, Sec. 2.

"The General Assembly shall have no power to deprive the Judicial Department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction, which does not pertain to the Supreme Court, among the other courts prescribed in this Constitution, or which may be established by law, in such manner as it may deem best; provide also a proper system of appeals; and regulate by law when necessary the methods of proceeding in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution."

Const., Art. 4, Sec. 12.

The whole theory of our government is opposed to the wiping out of the line of demarcation between ministerial powers and judicial powers—also between legislative powers and judicial powers. The founders of our Constitution never contemplated that the courts of the land should sit dumb

and powerless in the midst of controversies respecting vested rights of property and sacred privileges of citizenship.

"A principle and guarantee of liberty, so acknowledged and common with the Anglican people that few think of its magnitude, yet of really organic and fundamental importance, is the division of government into three distinct functions, or rather the keeping of these functions clearly apart. It is, as has been mentioned, one of the greatest political blessings of England, that from a very early period her courts of justice were not occupied with 'administrative business,' for instance, the collection of taxes, and that her parliament became the exclusive legislature, while the parliaments of France united a judicial, legislative and administrative character. The union of these functions is absolutism, or despotism on the one hand, and slavery on the other, no matter in whom they are united, whether in one despot or in many, or in the multitude, as in Athens after the time of Cleon the tanner. The English political philosophers have pointed out long ago the necessity of keeping the three powers separate in a 'constitutional' government. Those, however, who have no other definition of liberty than that it is equality, discard this division, except, indeed, so far as mere convenience of transacting business would require."

Lieber's Civil Liberty and Self Government, 150.

"Power, according to its inherent nature, goes on increasing until checked. The reason is not that power is necessarily of an evil tendency, but because without it, it would not be power. Montesquieu says: 'It is the lasting experience that every man, who has power, is brought to the abuse of it. He goes on until he finds its limits.' And so it is with 'every man,' because it lies in the very nature of power itself."

Ibid., 152.

Said Mr. Webster (Works, Vol. 4, p. 122): "Every free

government is necessarily complicated, because all such governments establish restraints, as well on the power of government itself as on that of individuals. If we will abolish the distinction of branches, and have but one branch; if we will abolish jury trials and leave all to the judge; if we will then ordain that the legislator shall himself be that judge; and if we place the executive power in the same hands, we may readily simplify government, we may easily bring it to the simplest of all possible forms, a pure despotism. But a separation of departments, so far as practicable, and the preservation of clear lines of division between them, is the fundamental idea in the creation of all our constitutions; and, doubtless, the continuance of regulated liberty depends on maintaining these boundaries."

"The independence of the law or administration of justice requires the independence of the judge. All the guaranties we have mentioned support the judge in his independence, and are requisite for it. He cannot be so without a distinct separation of the judiciary from the other branches of the government, without a living, self sustaining justice, or without the accusational procedure."

Lieber's Civil Liberty and Self-Government, 220.

"The law is not independent, and consequently the citizen is not free, where aught else than the administration of justice belongs to the Court, and where anything that belongs to the administration of justice is decided by any one but the courts; where things are decided by aught else than the natural course of law, and where, as has been stated, interpretation or application belongs to any one else than to the judiciary."

Ibid., 220.

Said Mr. Hamilton, Federalist, No. 78, p. 356: "This simple view of the matter suggests several important consequences; it proves incontestibly that the judiciary is beyond

comparison the weakest of the three departments of power; that it can never attack with success either of the other two, and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though indvidual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean so long as the judiciary remains truly distinct from both the legislature and executive. For I agree that 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' It proves, in the last place, that as liberty has nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments, that as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches; that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and in a great measure, as the citadel of the public justice and the public security."

Again, on p. 361 (No. 79), he says: "Next to permanency in office, nothing can contribute more to the independence of the judges than the fixed provision for their support. The remark made in relation to the president is equally applicable here. In the general course of human nature, a *power over a man's subsistence amounts to a power over his will*, and we can never hope to see realized in practice the complete separation of the judicial from the legislative power in any system which leaves the former dependent for pecuniary resource on the occasional grants of the latter."

That the Railroad Commissioners are judges of a court of

record under the power conferred in Art. 4, Secs. 2, 12 and 30, has been expressly settled.

Express Co. *v.* Railroad Co., 111 N. C., 463.
Railroad Co. *v.* Tel. Co., 113 N. C., 213.
Leavell *v.* Tel. Co., 116 N. C., 211.
Laws 1891, Ch 498.

Being judges under the power conferred in the Constitution, they come under Const., Art. 4, Sec. 31, which empowers the General Assembly upon a concurrent resolution of two-thirds of both houses to remove them and any other judges of the State "for mental or physical inability." But by this mode of proceeding they alone of all the judges of the State are removable by the Governor and the Legislature, without a trial. For no method of trial is prescribed.

This, then, is a denial of the equal protection of the laws.

See Yick Wo *v.* Hopkins, 118 U. S., 356, 369, 370, 373.
Cooley's Con. Lim., 485, 486.
Gulf, etc., R. Co. *v.* Ellis, 165 U. S., 150, 155, 160.

But so much that is cited under the due process discussion, is also pertinent on this subject that I need not pursue the matter further. The peculiar doctrine of North Carolina as to an officer's contract rights and his property rights in his office will be found stated in Wood *v.* Bellamy, 120 N. C., 212; Hoke *v.* Henderson, 4 Dev., 1; Cotten *v.* Ellis, 7 Jones, 545; King *v.* Hunter, 65 N. C., 603.

On the point of the judicial character of the Governor's action I desire to add these authorities: Mechem Pub. Officers, sec. 455; State *v.* Pritchard, 36 N. J. L., 101; Arkle v. Board Commissioners, (W. Va.) 23 S. E. Rep., 804; Speed *v.* Com. Council, 98 Mich., 360 (39 Amer. St. Rep., 555); Board Coms. *v.* Johnson, 124 Ind., 145 (19 Amer St. Rep. 88); State *v.* Harrison, 113 Ind., 234; Cooley Cons. Lim., 109–111.

In conclusion, I respectfully submit that there is no warrant whatever for the contention that this is a frivolous or

dilatory resort to this Court. On the contrary, the case of the defendant in error is utterly without support under the principles of constitutional government which our fathers have handed down to us and under which we have lived.

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Note:- After this brief was in type, my attention was called to Del Castillo v. Mc Connico, 18 Sup. Court Rep. 229, decided by this Court Jany. 3rd, 1898. The case clearly shows that due process must be found in the State statute and that to determine its existence is the final province of this Court. This paramount obligation being fulfilled, as to other matters the State interpretation of its own law is controlling.